the Writ. It was further contended on their behalf that where, as in the present case, the cause of action, to which the Writ related, had become time-barred, the authorities establish the principle that the court should not exercise its discretion to renew the Writ, and by doing so, deprive the Respondents of an otherwise good defence to the claim, unless there were exceptional circumstances which amounted to a good and sufficient cause for doing so.

In opposing the application, the Appellants through their Solicitors deposed that their only source of information was the records kept by the Port of Singapore Authority to whom they had made regular telephonic enquiries. It appeared that their enquiries made in 1978 with Lloyd's Intelligence Service through their London Solicitors revealed that the vessel was laid up in the Philippine waters in November 1978. Proceedings by way of attachment could only be taken against the vessel in the Philippines if a bond equivalent to the amount of the claim was posted. They were therefore not pursued.

It was only in July 1982 that the Appellants received confidential information that the vessel's name had been changed from "Heavy Lift Hero" to "Big Beacher" and that she was then lying in Singapore waters, whereupon the arrest was effected. In the circumstances, the Appellants claimed that they had not been lax in the prosecution of their claim.

After hearing the application, the learned Deputy Registrar dismissed the application of the Interveners who successfully appealed to the learned Chief Justice. Against the decision of the learned Chief Justice, this appeal was brought before us.

The principle governing the renewal of a Writ has been firmly settled by the decision in *Heaven* v. *Road and Rail Wagons Limited*[1]. It is this. Where an application to renew a Writ is made after the expiry of the relevant period of limitation, the court should not exercise its discretion in favour of renewing the Writ, the effect of which would be to deprive the defendants of an otherwise good defence to the claim, unless there were exceptional circumstances which amount to a good and sufficient cause for renewing the Writ. Such circumstances, as a guide, were ably set out by Brandon J. (as he then was) in *The Berny*[2]. They are so well known that we do not think it is necessary to repeat them. It was quite plain to us in the course of the arguments that the Appellants in 1980 had failed to take reasonable steps to trace the whereabouts of the vessel and effect service of the Writ. They did not continue to keep a check with Lloyds Intelligence Service and the Panamanian Authorities in 1980 as they had done earlier. If they had done so, the change of the name of the vessel and its presence in Singapore for an extended period in the last quarter of 1980 would have been discovered by them. Instead, they had relied on the records of the Port of Singapore Authority, which only showed the latest name of the vessel, and on a few phone calls to them. The unreliability of their enquiries, and the inconclusive nature of any answers these enquiries must have elicited, ought to have been plain to the Appellants. We therefore saw no reason to interfere with the discretion exercised by the learned Chief Justice.

Appeal dismissed.

Solicitors: *C. Arul & Partners; Godwin & Co.*

ARTIC BUILDERS & CO. (PTE.) LTD. v. TAN TONG MENG CO. (PTE.) LTD.

[C.A. (Wee Chong Jin C.J., Kulasekaram & Lai Kew Chai JJ.) May 11, 1984]
[Singapore – Civil Appeal No. 52 of 1981]

Arbitration – Interim Award – Application for award to be set aside, varied or remitted to Arbitrator – Remission Order – Whether there was miscarriage of justice at remission hearing

Administrative Law – Natural justice – Arbitration – Whether arbitrator had acted judicially and fairly at remission hearing.

By a written agreement dated November 15, 1975, the appellants/defendants agreed to erect and complete for the respondents/plaintiffs a 19-storey apartment block for $4,227,818.00. Clause 25(1) provided for the termination of the building agreement by the employer, i.e. the respondents. Before the completion of the works, the respondents by a letter of June 2, 1978 terminated the appellant's employment. On June 1978 the parties agreed to refer all matters in dispute between them to a sole arbitrator. The latter made an Interim Award on May 9, 1979. The respondents sought to set aside, vary or remit to the Arbitrator the Interim Award on 5 grounds. The respondents contended, *inter alia*, that the Interim Award did not deal with all the matters referred to by the Arbitrator for his decision. The remission went to the Arbitrator and he

published his Findings pursuant to the Order of Court of March 4, 1980. The respondents filed another Originating Motion to set aside, vary or remit the Interm Award as amplified by the Arbitrator's said Findings.

The Originating Motion was heard by Rajah J. in May 1981 (see [1982] 1 M.L.J. 114). The learned Judge held, *inter alia,* that there was a miscarriage of justice at the remission hearing principally on 2 grounds: (a) the arbitrator had failed to disclose his notes of evidence by appending them to his remission findings; and (b) the arbitrator had failed to allow Counsel for the respondents to submit on the notices which were allegedly given and which would have founded a termination under Clause 25(1)(b) by reason of which the hearing at the remission was unfair to the respondents.

Held: (1) although the learned Judge thought that the arbitrator should have made his notes of evidence a part of his Interim Award, there are very good reasons why, save possibly in the exceptional cases, notes of evidence of the arbitrator should be excluded from an award. In arbitrations, findings of facts are within the sole province of the arbitrator. Under the law of arbitration as unamended, which applied to this arbitration, the courts' supervisory jurisdiction is exercised only (a) where there is a manifest error of law on the face of the Award; (b) where there is a misconduct; or (c) where a special case is stated on a question of law;

(2) in this case, so far as the remission findings are concerned, there was no misconduct, in the technical sense, on the part of the arbitrator. The arbitrator should not, as he quite properly did not, entertain any submission nor hear any evidence bearing on Clause 25(1)(b) nor make any findings thereon;

(3) the allegations of the respondents made in their affidavit, which related to the remission hearing and findings, were not matters properly before the learned Judge nor were they matters which could have arisen in the first Originating Motion.

Cases referred to:

(1) *Tersons Ltd.* v. *Stevenage Development Corporation* [1965] 1 Q.B. 37.

(2) *Yat Tung Investment* v. *Dao Heng Bank* [1975] A.C. 581.

COURT OF APPEAL.

C.S. Wu for the appellants.

P. Selvadurai (*R.S. Rabindran* with him) for the respondents.

Cur. Adv. Vult.

Lai Kew Chai J.: By an agreement in writing dated November 15, 1975 between Artic Builders & Co (Pte.) Ltd., (hereinafter referred to as "the Appellants") and Tan Tong Meng Co. Pte. Ltd., (hereinafter referred to as "the Respondents"), the Appellants agreed to erect and complete for the Respondents a 19-storey apartment block at the price of $4,227,818.00.

Clause 25(1) providing for the termination of the building agreement was in the following terms:–

"25(1) If the Contractor shall make default in any one or more of the following respects, that is to say:–

(a) If he without reasonable cause wholly suspends the carrying out of the Works before completion thereof, or

(b) If he fails to proceed regularly diligently with the Works, or

(c) If he refuses or persistently neglects to comply with a written notice from the Architect requiring him to remove defective work or improper materials or goods and by such refusal or neglect the Works are materially affected, or

(d) ...

then the Architect may give to him a notice by registered post or recorded delivery specifying the default, and if the Contractor either shall continue such default for fourteen days after receipt of such notice or shall at any time thereafter repeat such default (whether previously repeated or not), then the Employer without prejudice to any other rights or remedies, may within ten days after such continuance or repetition by notice by registered post or recorded delivery forthwith determine the Employment of the Contractor under this Contract provided that such notice shall not be given unreasonably or vexatiously."

Before the completion of the works the Respondents by a letter dated June 2, 1978 terminated the Appellants' employment. On June 26, 1978 the parties agreed to refer all matters in dispute between them to a sole arbitrator, Mr. Cashin, an advocate and solicitor.

The arbitration proceedings commenced on January 23, 1979 and on May 9, 1979 the arbitrator published his Interim Award on the issue of liability. It is common ground that the parties agreed that the Interim Award was a "speaking" award, that is, an award which deals with all issues of fact and law and the findings of fact being final and conclusive. The arbitrator found that the Respondents did not procedurally give the notices as required by Clause 25(1) of the contract and that therefore no proper notice of termination was given. The arbitrator also found that on the facts there was no sufficient justification for the notices leading to the letter of termination of June 2, 1978.

On June 18, 1979, the Respondents' solicitors wrote to the arbitrator a letter which reads:–

"H.E. Cashin Esq.,
Messrs Murphy & Dunbar,
1901 Hong Leong Building,
(19th Floor)
Raffles Quay,
Singapore 1

Dear Sir,

Re: Arbitration between Artic Builders & Co Pte Ltd and Tan Tong Meng & Co Pte Ltd.

1. We have now been instructed to act for M/s Tan Tong Meng & Co Pte Ltd., the Respondents in this Arbitration, in place of M/s C.B. Yeow & Co., and refer to the Interim Award signed and published by you on the 9th May 1979.

2. We have perused your Interim Award in the context of the Pleadings and other documents which were placed before you in this Arbitration. We refer in particular to the Architects, Messrs. Ong & Ong's letter of the 17th May 1978 to the claimants and to Messrs. S.K. Lee & Co's letter of the 2nd June 1978 to M/s Donaldson & Burkinshaw. Whereas, both the said letters invoked the provisions of Clause 25(1) of the Agreement dated 15th November 1975 between the claimants and the Respondents, they did not limit the Respondents' rights to Clause 25(1)(c). Indeed, in terminating the contract under the provisions of Clause 25(1) of the Agreement, the Respondents were not limiting their rights to the facts and circumstances that may have fallen to be governed by Clause 25(1)(c). Instead, the Respondents were relying upon the record of performance or the lack of it of the claimants under the entire contract.

3. In the circumstances, your Interim Award, predicated, as it is, upon the limited issues and facts that may have fitted themselves into the framework of Clause 25(1)(c) of the contract, has not considered all the other issues that were germane to the question of whether the Respondents' termination of the contract was legally valid and whether, further, the Respondents were entitled to their counterclaim in all the circumstances of the case.

4. Due to the foregoing considerations we have been instructed to take matters further and we would be grateful to know if you would be prepared, in view of the larger issues we have referred to above, to state a special case to the Court with respect ot your Interim Award on the question of whether you were right in considering the effect in law of Clause 25(1)(c) only and not the entire Clause 25(1) of the contract. We refer in this regard to s.28 of the Arbitration Act, Cap. 16.

5. We would be grateful to have your reply by return, as, we may have to move the Court for appropriate relief within the time limited by the rules, otherwise.

Yours faithfully,
Sgd: Rodyk & Davidson"

On June 20, 1979 the Arbitrator replied by letter which reads:—

"M/s. Rodyk & Davidson,
Singapore.

Dear Sir,

Arbitration between Artic Builders & Co Pte Ltd and Tan Tong Meng & Co Pte Ltd.

I thank you for your letter of 18th June 1979.

1. At the end of the first phase of the hearing I clarified with Mr. C.S. Wu, Counsel for the Claimants, and with Mr. M. Karthigesu, Counsel for the Respondents, the form in which they wished me to make my award. I first asked Mr. Karthigesu whether he wanted me to give my award by way of case stated and his reply to me was that this would not be necessary if my award was to be given in "speaking" form. Mr. Wu agreed.

2. My note on this reads "K states no need for case stated if I give "speaking" award. FW agrees." I should explain that Mr. C.S. Wu is also known as Mr. Fred Wu hence the reference to FW.

3. At the opening of his case Mr. C.S. Wu referred to the notices allegedly sent under section 25(1) by the Respondents and as a result on the 24th of January 1979, Mr. Karthigesu applied to amend the particulars in order to reply upon the minutes of a meeting held on March 21, 1979. The minutes themselves were dated 23rd March. Both Counsel during the course of Mr. Wu's opening agreed that it was sub-clause (c) of Clause 25(1) on which the Respondents were relying. If further clarification was needed, in his opening, I have recorded Mr. Karthigesu as saying "Confine F's evidence to the issue as to whether determination of contract was justified. Rely on amendment made –

25(1) (c) of Contract
3 documents
(1) Minutes 23.3.78
(2) Letter 17.5.78
(3) Letter 2.6.78"

Mr. Karthigesu then went on to direct his entire case towards these issues and in his closing address once again limited his argument to 25(1)(c).

4. In these circumstances, I find it impossible to concede that the Respondents did not limit their rights to Clause 25(1)(c). I do not accept that they relied upon the record or performance or the lack of it of the Claimants under the entire contract.

5. Further, in view of the fact that both Counsel agreed that I should not submit my award as a case stated for the decision of the High Court, I do not see how following that agreement the Respondents can now invite me to state a case.

6. Finally, in the manner in which this first phase of the arbitration was agreed to be taken and heard, I am of the view that I am *functus officio* as far as this phase of the arbitration is concerned. However, it is open to you to apply to Court for any order which you may think proper or applicable.

Yours faithfully,
Sgd: H.E. Cashin"

On the same day, June 20, 1979 the Respondents filed in the High Court Originating Motion No. 39 of 1979 seeking to set aside, vary or remit to the arbitrator the Interim Award on five grounds as set out in the Notice of Motion. On October 6, 1979 the Respondents filed a "Supplementary Notice of Additional Grounds of Appeal" setting out a sixth ground on which they relied.

The Originating Motion was part-heard by Rajah J. on October 11 & 12, 1979. The hearing was resumed on March 4, 1980 when an order was made that "The case be remitted to the Arbitrator, Mr. H.E. Cashin on the question of whether the Respondents had made Clause 25(1)(a) and Clause 25(1)(b) of the Building Contract dated November 1975 part of their case, and if so, the Arbitrator do make his findings on the Respondents' case under these Clauses."

Pursuant to the remission order the parties appeared before the arbitrator on April 2, 1980 and on April 10, 1980 the arbitrator published his remission findings. The arbitrator found that the Respondents relied only on Clause 25(1)(c) on the question of termination in presenting their case before him during the arbitration proper. In his published remission findings he also ruled that he would not re-open the case and hear further submissions as to what notices were given which might have satisfied termination under Clause 25(1)(b).

As much has turned in the proceedings below and will turn in the appeal before us on the remission findings of the arbitrator, we find it necessary to quote extensively from them. At the remission hearing, Mr. M. Karthigesu, who was counsel at the original arbitration hearing, also appeared in a neutral position to assist the arbitrator and the parties.

The arbitrator stated in his remission findings as follows:—

"I have already in my Award stated that the notes of evidence do not form part of the Award. I cannot now vary my Award. I have perused my notes of evidence very carefully. Indeed as a result of an exchange of letters when Mr. Selvadurai took over from the Respondents' previous solicitors, I had already had occasion to study this issue closely.

At the original hearing Mr. Wu opened at length and referred to the termination provisions under Clause 25 of the contract. It is common ground that at quite an early stage, he, Mr. Wu, asked Mr. Karthigesu, then Counsel for the Respondents, if he could confirm that 3 notices were required under Clause 25(1)(c) and Mr. Wu cited *Keating* on Building Contracts on the point. Mr Karthigesu confirmed this before me. It was at this stage in the original hearing that Mr. Karthigesu indicated that he would be asking to amend particulars to meet the case of determination under Clause 25(1)(c). This in fact Mr. Karthigesu did the next day. I confirm that at the original hearing Mr. Wu stated that he needed to know, as he would have to decide the extent of the evidence to be called, whether the Respondents were relying only upon Clause 25(1)(c). Mr. Wu stated no one at any point relied on assignment [Clause 25(1)(d)] or total suspension [Clause 25(1)(a)]. Before me Mr. Karthigesu agreed that he had not relied on 25(1)(a) or 25(1)(d).

Mr. Wu pointed out that the evidence required under Clause 25(1)(c) might well overlap with the evidence required to satisfy Clause 25(1)(b).

Mr. Wu then pointed out that in his opening it was his distinct recollection that Mr Karthigesu stated that his case for determination was only under Clause 25(1)(c). He then pointed out that the evidence led by Mr. Karthigesu from witnesses concerned determination under Clause 25(1)(c). Mr. Karthigesu interjected that he placed particular emphasis on Clause 25(1)(c). He did not think that in doing this he had abandoned Clause 25(1)(b). He agreed that he had not referred to the notices required to satisfy Clause 25(1) (b). Mr. Karthigesu then pointed out that the evidence required to satisfy Clause 25(1)(c) would overlap with that required to satisfy Clause 25(1)(b). Mr. Selvadurai, as I have said, was handicapped in that he was not present at the original hearing. He made various references to the evidence which in my opinion were not correct. He then asked me for my notes of evidence and stated that he wished to know what that evidence was so that he could argue before me that Clause 25(1)(b) had been relied upon. He also wished thereafter to address me so that he could point out to me now what letters in his view constituted the notices required to satisfy Clause 25(1)(b).

I ruled that I would not re-open the case and would hear no further submissions as to what notices were given which satisfied termination under Clause 25(1)(b). I also stated that I would not make any notes available to either Counsel and stated that I would give my reasons in writing later. As I have said, in my Interim Award I did not make the notes of evidence part of the Award and I am of the view that I cannot vary that decision and so I cannot publish my notes of evidence now.

I do not think it necessary for me to go into much detail. I am competely satisfied that in the manner in which the Claimants' case was presented by Mr. Wu and as a result of the answers given by Mr. Karthigesu to queries raised by Mr. Wu with regard to which particular sub-clause of Clause 25 he was relying on the point of termination, Mr. Karthigesu, although originally he was not completely satisfied that he would rely only on Clause 25(1)(c), in fact never cross-examined in sufficient breadth to indicate that he was relying on Clause 25(1)(b) as well. The amendment for which he asked, which had direct bearing on the notices on which he was relying, related entirely to Clause 25(1)(c).

Much more important, in his opening I have recorded him as saying as follows:–

"Confine evidence to the issue as to whether determination of contract was justified.

25(1)(c) of contract. 3 documents.
1. Minutes of 23/3/78.
2. Minutes of 17/5/78.
3. Minutes of 2/6/78."

He then referred to the contract.

It was quite clear that when Mr Karthigesu said that he confined his evidence to the issue as to whether the determination of the contract was justified, he meant exactly what he said and that was tantamount to his reliance only on Clause 25(1)(c). It is interesting to note that the evidence led by him related only to this issue. The only notices he referred to again related only to this issue and at no stage of his address was Clause 25(1)(b) ever mentioned.

As I have already pointed out, it is common ground that no one relied on total suspension of the contract or termination under Clause 25(1)(a).

I therefore find that the Respondents relied only on Clause 25(1)(c) on the question of termination in presenting their case to me."

Ten days before the first Originating Motion filed in 1979 was finally disposed of, an affidavit of Tan Wai See was filed on behalf of the Respondents. It was deposed on behalf of the Respondents that Mr. Karthigesu at the remission hearing had stated that the evidence that was recorded by the arbitrator was not confined to the situation under Clause 25(1)(c) but covered the situation under Clause 25(1)(b) as well. Mr. Karthigesu, it was further deposed to, then went on to state that whilst he had concentrated on the situation under Clause 25(1)(c) in making his submission on the law, he had not abandoned or waived the Respondents' rights under Clause 25(1)(b) of the building agreement. The Respondents also complained very strongly that the arbitrator had wrongfully refused to reveal his notes of the evidence. In the circumstances, the Respondents contended that the arbitrator had by his rulings shown against them bias such that the Interim Award as amplified by his remission findings ought to be set aside.

The 1979 Originating Motion was heard for the last time before Rajah J. on May 22, 1980. At the conclusion of it, the learned Judge ordered that the Respondents pay the Appellants' the costs of the motion and the remission hearing. It should be noted that in terms, the Order of Court stated that the motion came on for further hearing "on the question of costs." As far as that particular motion is concerned, that was the last order made and there has been no appeal.

What had happened was that a week earlier, on May 15, 1980, the Respondents had filed another Originating Motion No. 31 of 1980 and sought an order from the High Court to set aside the Interim Award of the arbitrator as amplified by the remission findings. In support of the motion, the Respondents set out altogether seven grounds, the first six of which were a repetition of the six grounds which were unsuccessfully canvassed in the 1979 motion.

The seventh ground was in these terms:–

"7. That the learned arbitrator had misconducted himself by showing bias against the Plaintiffs and failing to observe the rules of natural justice during the Remission Hearing that took place on the 2nd of April 1980 pursuant to the Order made by the Honourable Mr. Justice A.P. Rajah on the 4th of March 1980 in Originating Motion No. 39 of 1979."

The Originating Motion was also heard by Rajah J. in May, 1981. In his reserved judgment, he held that the seventh ground was made out and he set aside the Interim Award as amplified by the remission findings. Against this judgment, this appeal is brought.

The learned Judge had come to the conclusion that there was a miscarriage of justice at the remission hearing principally on two grounds: viz, (a) the arbitrator had failed to disclose his notes of evidence by appending them to his remission findings; and (b) the arbitrator had failed to allow Counsel for the Respondents to submit on the notices which were allegedly given and which would have founded a termination under Clause 25(1)(b) by reason of which the hearing at the remission was unfair to the Respondents.

The important question for our decision is whether the arbitrator had acted judicially and fairly at the remission hearing in coming to the conclusion that the Respondents had confined their termination of the building contract under Clause 25(1)(c). It has been common ground throughout that no reliance has been placed on Clause 25(1)(a). Had the Respondents kept alive their alternative case of lawful termination under paragraph 25(1)(b)?

Having scrutinised the Interim Award and the remission findings, we are entirely satisfied that the

Respondents had confined their case of termination solely under Clause 25(1)(c) and had, in fact, abandoned whatever case they had had under Clause 25(1)(b). The remission findings which we have quoted disclosed the evidence and the reasons which clearly support the arbitrator's conclusion. We need not repeat them. We note that it was recorded in the arbitrator's notes of evidence that Mr. Karthigesu had said words to the following effect:

"Confine evidence to the issue as to whether determination of contract was justified.
25(1) (c) of contract. 3 documents.

1. Minutes of 23/3/78.
2. Minutes of 17/5/78.
3. Minutes of 2/6/78."

Although the learned Judge thought that the arbitrator should have made his notes of evidence a part of his Interim Award, we must again stress that there are very good reasons why, save possibly in the exceptional cases, notes of evidence of the arbitrator should be excluded from an Award: see *Tersons Ltd* v. *Stevenage Development Corporation*[1]. In arbitrations, findings of facts are within the sole province of the arbitrator. Under the law of arbitration as unamended, which applied to this arbitration, the Courts' supervisory jurisdiction was exercised only (1) where there is a manifest error of law on the face of the Award; (2) where there is a misconduct; or (3) where a special case if stated on a question of law.

So far as the remission findings are concerned, we are unable to find any misconduct, in the technical sense, on the part of the arbitrator.

The learned Judge was also critical of the arbitrator's refusal to hear any submission from the Respondents on Clause 25(1)(b). We are unable to understand the criticism. Having answered the first limb of the remission order in the negative, it is plain and logical that the arbitrator should not, as he quite properly did not, entertain any submission nor hear any evidence bearing on Clause 25(1)(b) nor make any findings thereon.

Before us, the Appellants also relied on the plea of *res judicata*. They contended that the seventh ground in the second Originating Motion was first raised in the Respondents' affidavit of May 12, 1980 in the course of the first Originating Motion. Relying on *Yat Tung Investment* v. *Dao Heng Bank*[2], the Appellants further contended in the alternative that the matter could have been raised in the first Originating Motion. Not having raised it, the Respondents were precluded, as the Appellants contended, from raising it in the second Originating Motion. In our judgment, the plea of *res judicata* must fail. A remission order having been made, the first Originating Motion was virtually spent. When the final order was made by the learned Judge, he and the parties before him were all only concerned with the single question of dealing with the question of the costs of the first Originating Motion. Indeed, the terms of the order expressly confirm the position. We are satisfied that the allegations of the Respondents made in their affidavit, which related to the remission hearing and findings, were not matters properly before the learned Judge nor were they matters which could have arisen in the first Originating Motion.

For these reasons, we accordingly allow the appeal with costs here and below. The order of the learned Judge is set aside.

Appeal allowed.

Solicitors: *Donaldson & Burkinshaw; Rodyk & Davidson.*

R. MURUGASON v. THE STRAITS TIMES PRESS (1975) LTD.

[O.C.J. (Chua J.) February 21, 1984]
[Singapore – Suit No. 812 of 1981]

Tort – Libel – Innuendoes – Claim for damages for publication in newspaper – Onus on plaintiff to prove special facts capable of being understood in secondary and defamatory sense by persons to whom special facts are known.

Legal Profession – Libel – Innuendoes – Newspaper publication imputing conduct unethical and unbecoming an advocate and solicitor.

The plaintiff, an advocate and solicitor, claimed damages against the defendants for a libel contained in a report headed "Woman claims T. Blangah election was rigged" and published in the defendants' newspaper, *The Straits Times* of January 22, 1981.

In the 1980 General Election the Telok Blangah constituency was contested by Rohan bin Kamis of the Peo-